Filed 10/24/12 P. v. Tillman CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEE ANDER TILLMAN, JR., Defendant and Appellant.	E054441 (Super.Ct.No. SWF1101114) **OPINION**

APPEAL from the Superior Court of Riverside County. Thomas Glasser, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and William M. Wood and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

During an argument with his then-girlfriend, defendant Lee Ander Tillman, Jr., made her get out of his car, then ran over her with his car — once going forward and again going backward.

After a jury trial, defendant was found guilty of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) In a bifurcated proceeding, the trial court found one prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)), one prior prison term enhancement (Pen. Code, § 667.5, subd. (b)), and one "strike" prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) to be true. Defendant was sentenced to a total of 14 years in prison, plus the usual fines and fees.

Defendant now contends:

1. There was insufficient evidence of the mental state necessary for assault.

2. The trial court erred by admitting evidence that defendant had committed a prior act of domestic violence.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Case for the Prosecution*.

Defendant lived in Perris, at the home of one April Wallace and her family. He slept on a couch or, on weekends, in a van body that had been converted into an "outside room" behind the house.

On either April 30 or May 1, 2011, defendant picked up Jane Doe[1] and brought her home to stay with him for the weekend. At that point, defendant and Doe had been dating for "a few months."

Doe was drinking and got drunk. That evening, defendant and Doe went to visit a friend of defendant's; Doe did not remember his name or address. While they were there, they got into an argument.

As defendant was driving them back to his house, they went "off [a] dark road." There were no houses; Doe remembered only "a big white gate" and "huge rocks . . . overlooking somewhere." The argument started up again. Defendant stopped, reached over, opened the passenger-side door, and told Doe to get out.

Doe "stepped [her] right foot out and then [her] left . . . ." The car moved forward; one of the tires "caught [her] leg" and caused her to fall. She was lying on her back on cement and gravel. The car ran over the left side of her body. She screamed to defendant to stop. Defendant then ran "right back over [her] again."[2]

---

[1] The trial court ordered that the victim be referred to by this fictitious name. (Pen. Code, § 293.5.)

[2] Doe admitted that she only "vaguely remembered that day." When asked whether the car ran over her immediately after she stepped out of it, she said, "I really don't remember." When asked which tire caught her leg, she said, "I really don't remember." She did not remember which foot got caught. She did not remember how many tires went over her either time. When asked, "But you're saying both times at least one tire went over you?," she answered, "I really don't remember."

Defendant got out, sat on Doe, and banged her head on the cement. She started going "in and out" of consciousness. However, she did remember defendant picking her up and putting her in the car. She also remembered going back to defendant's house.

Doe awoke the next morning in defendant's bed. She "was in a lot of pain." She had trouble walking. However, she did not leave or ask defendant to take her to a doctor because she did not realize how severe her injuries were. She was "in shock" and "out of it." That day, they went to "the lake." They bought ice to put on her injuries and a bottle of liquor "for the pain."

Around 9:00 p.m., April Wallace said that Doe had to leave. Defendant drove Doe to her sister's house. As soon as Doe's sister saw her, she took her to a hospital. Doe's sister also called the police.

Around 11:00 p.m. on May 2, a physician's assistant at the emergency room examined Doe. She had a scrape on her left knee, bruises on her left leg, a bruised and swollen left elbow, a scrape near her coccyx, and bumps on her head.[3]

In the opinion of the physician's assistant, these injuries were consistent with being run over by a car. Alcohol tends to relax the muscles, and such relaxation can reduce the degree of injury. Based on a blood sample taken at the hospital at 11:46 p.m. on May 2, Doe's blood alcohol level was 0.362 percent.

---

[3] According to Doe, as a result of defendant banging her head on the cement, she also sustained a "brain injury."

At 11:15 p.m., a police officer met Doe at the hospital. She was "very reluctant" to talk to him, but she did let him photograph her injuries.

The police tried to find defendant's car, but it was not at his house.

As discussed further in part III, *post*, there was evidence that defendant had committed a prior act of domestic violence.

B. *The Case for the Defense*.

Doe did not have any broken bones, and none of her injuries required stitches.

Doe had told an investigator that the car went backward first and then forward. She also said that it ran over her head as well as her legs. She was given the opportunity to obtain a protective order, but she declined.

About a week after the incident, Doe was diagnosed as having alcoholic hepatitis. Memory loss and blackouts are possible side effects of alcoholic hepatitis.

April Wallace and defendant had been friends for 15 years. Wallace testified that she saw defendant and Doe on April 30, around 3:00 p.m. Around midnight on April 30-May 1, she saw them again as they got back to the house. Doe "opened up the car door and fell out . . . ." Then she tripped over a planter, breaking it. She "was batting at stuff that wasn't even there."

The next morning, May 1, defendant and Doe were "laughing and joking and just having a good time." Around 2:00 p.m., they went out. They got back sometime after 1:00 a.m.

The morning after that, May 2, defendant and Doe got up around 11:00 a.m. and went out. They were "laughing, talking, and holding hands." Doe was not limping. When they came back, around 7:00 p.m., Wallace told defendant, "[T]he weekend's over. She's gotta go." Wallace admitted disliking Doe.

II

THE SUFFICIENCY OF THE EVIDENCE OF ASSAULT

Defendant contends that there was insufficient evidence of the mental state necessary for assault.

"In reviewing a criminal conviction challenged as lacking evidentiary support, '"the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 241.)

"We '"'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 943.) "When the circumstances reasonably justify the jury's findings, a reviewing court's opinion that the circumstances might also be reasonably reconciled with contrary findings does not warrant reversal of the judgment. [Citation.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.)

"[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*People v. Williams* (2001) 26 Cal.4th 779, 788, fn. omitted.)

In 2011, when the crime was committed, Penal Code section 245, subdivision (a)(1) could be violated either by an assault with a deadly weapon (other than a firearm) or by an assault by means of force likely to produce great bodily injury. (Stats. 2004, ch. 494, § 1, p. 3155.) The information, however, alleged only an assault with a deadly weapon, "to wit: vehicle." (Capitalization omitted.) In addition, the jury specifically found defendant guilty of assault with a deadly weapon, "to wit: vehicle . . . ." (Capitalization omitted.) Accordingly, we cannot sustain defendant's conviction based on the evidence that he banged Doe's head on the road. We must confine our review to the evidence that he ran over her.

There was evidence that defendant intended to harm Doe. They had argued. He drove off onto a dark road and stopped in a deserted area. He made Doe get out of the car. He then drove forward before Doe was clear of the car. Indeed, as Doe did not mention closing the car door, it is inferable that it was still open, and defendant could see exactly where Doe was.

Even assuming that defendant accidentally ran over Doe going forward, there was sufficient evidence that he intentionally ran over her the second time, going backward.

The jury could reason that, when he ran over her the first time, even if accidentally, he must have felt that her body was under his wheels. She was screaming at him to stop. Nevertheless, he deliberately put the car in reverse and drove back the same way.

Defendant's intent to injure Doe is also manifest from the fact that he got out of the car and slammed her head on the cement. This is hardly the act of a driver who has just accidentally run over a pedestrian.

Defendant argues that, "if" Doe fell face down, the car would have run over both of her legs, and her face would have been bruised. Doe actually testified, however, that she was lying on her back. The scrape over her tailbone was additional evidence of this. Similarly, defendant seems to assume that Doe was lying perpendicular to the path of the car. Actually, from her testimony that it ran over her left side, she seems to have been lying parallel to it. Thus, her testimony was perfectly consistent with her actual injuries.

In any event, Doe admitted that she remembered the whole day only vaguely. She had previously told an investigator that defendant ran over her backward first and then forward. The jury was entitled to conclude that she was mistaken about some of the details of the incident but correct about others.

Finally defendant attacks Doe's credibility, noting that she spent the following day with him, she was reluctant to talk to the police, and she declined a protective order. However, we do not reweigh credibility. "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or

falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) Doe explained that she did not leave because she did not realize how badly she was injured and because she was "out of it." Her actions — or inactions — are typical of victims of domestic violence.

We therefore conclude that there was sufficient evidence to support defendant's conviction for assault with a deadly weapon.

III

EVIDENCE OF PRIOR DOMESTIC VIOLENCE

Defendant contends that the trial court erred by admitting evidence that he had committed a prior act of domestic violence.

A. *Additional Factual and Procedural Background.*

The prosecution filed a written motion in limine to admit evidence that defendant had committed an act of domestic violence against a former girlfriend, Cassandra Tate.

According to the motion, in 1999, after an evening of drinking, defendant and Tate got into an argument. Defendant got a gun and fired one shot at Tate's head. It missed, but only narrowly. Defendant told her that "he missed her this time but next time he would shoot her in the back." The incident resulted in a conviction. Defendant had been sentenced to prison for 13 years; he had been released only about six months before the date of the charged offense.

The prosecution argued that the evidence was admissible under Evidence Code section 1109. Evidence Code section 1109, subdivision (a)(1) provides, "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." However, Evidence Code section 1109, subdivision (e), provides, "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

Defense counsel objected "based on the fact that the incident from 1999 exceeds the ten-year limit."

The prosecutor responded that defendant "should not benefit from the fact that he served a substantial time in prison and did not have the ability to commit any new domestic violence-related offenses because he was incarcerated. [¶] . . . And while there is a ten-year limitation codified in [Evidence Code] section 1109, it can still be admissible in the interests of justice."

The trial court ruled: "[B]ased upon what has been represented, that the defendant was in prison from shortly after the first incident until six months prior to the charged incident, . . . that really does make it in the interests of justice, because he's basically unable to commit that type of offense."

It added, "I did do an Evidence Code section 352 analysis, however . . . ." It ruled, "[I]t is highly probative. . . . [¶] I don't think there's any issue of confuse of the issues, particularly since it's not the same alleged victim."

The trial court therefore admitted the evidence, except that it excluded any evidence of defendant's sentence. At trial, Tate was called and testified more or less consistently with the prosecution's offer of proof.[4]

B. *Analysis.*

"By reason of section 110[9], trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every [domestic violence] offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other [domestic violence] offenses, or excluding irrelevant though

---

[4] Tate added that, after the argument but before the shooting, defendant "pulled my skirt and attempted . . . to rape me, really. And I kneed him in the balls."

Pursuant to a stipulation, the trial court instructed the jury that "[t]he conviction stemming from the 1999 incident did not involve a charge of rape or attempted rape."

inflammatory details surrounding the offense. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 [actually discussing an analogous statute, Evid. Code, § 1108].)

"Like any ruling under section 352, the trial court's ruling admitting evidence under section 110[9] is subject to review for abuse of discretion. [Citations.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1295 [actually discussing Evid. Code, § 1108].) "'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

Defendant argues that the trial court erred by finding that the "interests of justice" exception applied. It has been held, however, that "the 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes, as the trial court did here, that the evidence was 'more probative than prejudicial.'" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539-540.)

Defendant argues, "The fact appellant was imprisoned for a number of years should not have a bearing" on the court's determination under "the 'interest of justice' exception." However, it is a standard feature of the balancing analysis that, while the remoteness of prior criminal conduct reduces its probative value, the fact that the defendant was incarcerated in the interim, in turn, reduces the remoteness. (E.g., *People v. Daniels* (2009) 176 Cal.App.4th 304, 318 ["[a]lthough the 1990 rape occurred 15 years before the 2005 events, it was not remote because defendant had been incarcerated for the

vast majority of that period"].) Thus, the fact that defendant had been incarcerated was directly responsive to the Legislature's concern about remoteness, as codified in Evidence Code section 1109, subdivision (e).

Defendant therefore also argues that the trial court erred by finding that the evidence was more probative than prejudicial.

Evidence that defendant had a propensity to commit acts of domestic violence was substantially probative. "'In the determination of probabilities of guilt, evidence of character is relevant. [Citations.]' [Citation.] Indeed, the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) It was particularly probative in this case, because it tended to rebut any claim of accident.

At the same time, the evidence in this case was not particularly prejudicial. """The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'"' [Citation.] Evidence need not be excluded under this provision unless it 'poses an intolerable "'risk to the fairness of the proceedings or the reliability of the outcome.'"' [Citation.]" (*People v. Alexander* (2010) 49 Cal.4th 846, 905.)

The prior incident was slightly more inflammatory, in that defendant used a firearm, rather than a vehicle. However, both assaults had the potential of causing great bodily injury or death. In any event, the jury was instructed on the proper and improper

use of this evidence (CALCRIM No. 852), "and we must presume the jury adhered to the admonitions. [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1277.) The jury was also told that the prior incident resulted in a criminal conviction; hence, it was not likely to "be tempted to convict the defendant simply to punish him for the other offenses . . . ." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) As already discussed, the trial court could properly find that the prior incident was not unduly remote. And it did not consume an undue amount of time.

We therefore conclude that the trial court did not abuse its discretion by admitting the evidence that defendant had committed a prior act of domestic violence.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.